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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2041

NEWTON E. SEWELL and J. B. HOWELL,

Petitioners,

vs.

PENN CENTRAL TRANSPORTATION COMPANY and INDIANA HARBOR BELT RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

There is no opinion by the Court of Appeals. An unpublished Order was filed and is included as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254 (1). The judgment was entered by the Court of Appeals for the Seventh Circuit on April 19, 1974 (Appendix A).

QUESTION PRESENTED FOR REVIEW

The question raised by this case is whether the Complaint, alleging intentional and repeated harassment, threats and discharges of an employee and interference with safety work by an employee was properly dismissed under the authority of *Andrews* v. *Louisville* and *Nashville Railroad*, 406 U.S. 320 (1972).

STATUTE INVOLVED

Railway Labor Act, 45 U.S.C. Section 151-160 (Appendix B).

STATEMENT OF THE CASE

This action was brought by two employees of the Indiana Harbor Belt Railroad Company, charging the Railroad with abusing the provisions of the National Labor Railway Act and violating the constitutional rights of these employees. The Complaint requests an injunction against future threats and harassments and damages in the sum of $40,000. Although the Penn Central Transportation Company was named originally as a defendant, Plaintiffs did not contest dismissal of the Penn Central as a party. Jurisdiction was based on the original jurisdiction of the Federal Courts under U.S.C. Title 28 Sections 1331 and 1337 and it was alleged that the provisions of the Railway Labor Act, Title 45 U.S.C. Section 153 were in issue.

After the complaint was filed, defendants filed a Motion to Dismiss or for Summary Judgment. Following consideration of supporting and opposing memoranda, the District Court dismissed the Complaint on the authority of *Andrews* v. *Louisville* and *Nashville Railroad Company,* 406 U.S. 320 (1972). The Court of Appeals for the Seventh Circuit affirmed on April 19, 1974, in an unpublished order citing *Andrews* v. *Louisville* and *Nashville Railroad,* 406 U.S. 320 (1972) (Appendix A).

Since all of the issues before the Court arise from the pleadings, the facts of the case are in reality the allegations of the pleadings. The substance of the allegations are as follows:

The Plaintiffs are employees of the Indiana Harbor Belt Railway and have been subjected to a series of harassments and threats by corporate officials. These threats and harassments arise from the personal animosity of railroad officials toward the plaintiffs.

Plaintiff Howell has been threatened because he engaged in safety work on behalf of employees. He was dismissed on December 6, 1968 for his alleged responsibility in causing two fatal injuries. The evidence at his hearing did not support dismissal and he has followed the proper appeal procedures of the Railway Labor Act (Title 45 U.S.C. Section 153) under the procedure before the Railroad Adjustment Board his appeal will not be decided until approximately 1976 or 1977. As a result, the threat by railroad officials to "get your job" if he persisted in safety work, is effectively accomplished through use of the exclusivity requirement of the Railway Labor Act. Plaintiff Sewell has also been threatened and harassed because of the personal animosity of corporate officials. He has been discharged on two occasions and each time he has faithfully followed the appeal procedures of the Railway Labor Act. His appeal will not be decided until 1978 or 1979. His dismissals were based on his alleged responsibility for two fatal accidents and an alleged immoral activity of making out a time slip on May 8, 1972. In each case, the hearing conducted by the Railroad failed to establish his responsibility for the acts alleged. He has not been reinstated following his second discharge. Howell was reinstated on August 24, 1970.

ARGUMENT

In dismissing this case on the authority of *Andrews* v. *Louisville* and *Nashville Railroad,* 406 U.S. 320, 32 L.Ed. 2d 95, 92 S.Ct. 1562 (1972), the courts below accepted the Railroad's claim that all issues raised by the complaint are within the exclusive jurisdiction of the National Railroad Adjustment Board. The present complaint, however, seeks relief from conduct by the Railroad unrelated to any collective bargaining agreement and beyond the expertise of the National Railroad Adjustment Board. Plaintiffs seek to enjoin conduct which the Adjustment Board is powerless to prevent.

Plaintiff Sewell has alleged that he has been subjected to repeated discharge from his job as a result of the personal animosity of railroad officials. After the first discharge he was unilaterally reinstated by the carrier, but was again discharged for "participating in an immoral and unauthorized activity" by making out a time slip on May 8, 1972. It was further alleged that at his hearing or discharge, there was no showing of his responsibility. In his present complaint, he requested that the railroad be enjoined from harassing and threatening him.

Plaintiff Howell has alleged that he was threatened, harassed and discharged because he engaged in safety work on behalf of other employees. In participating in such safety activities, he asserts that he was engaging in constitutionally protected activities. As with Plaintiff

Sewell, he alleges that his discharge resulted from the personal animosity of railroad officials.

The injunctive relief sought by each Plaintiff cannot be provided by the Adjustment Board. The threats, harassment and repeated discharges are not related to the collective bargaining agreement, but represent a separate and distinct course of conduct for which the common law has traditionally provided a remedy. The constitutional claim raised by Howell raises issues for which there is no administrative remedy and which can only be judicially determined. Although the jurisdiction of the Adjustment Board is exclusive in areas concerning disputes and grievances, under the collective bargaining agreement, this court has never held that the exclusivity extends to all areas affecting employer/employee relations. Furthermore, where the Board has no power to order the relief requested, it has long been recognized that the federal courts may properly exercise jurisdiction. *Glover* v. *St. Louis - San Francisco Railroad Company,* 393 U.S. 324, 21 L.Ed. 2d 519, 89 S.Ct. 548 (1969).

These plaintiffs have also filed claims with the Adjustment Board seeking the relief provided by the Railway Labor Act. They have alleged in the complaint in this case that under the procedures of the Adjustment Board these cases will not be finally decided until 1978 or 1979. As a result, the procedures of the Adjustment Board provide only a technical remedy and one without substance.

The employer in effect has intentionally used the procedures of the Adjustment Board to deprive Plaintiff Sewell of his employment and has threatened the same

action with respect to Howell. Plaintiffs claim that in effect this constitutes unreasonable governmental interference in their right to hold specific private employment and to follow a chosen profession contrary to their rights under the Fifth Amendment. *Greene* v. *McElroy*. 360 U.S. 474 (1959).

Where the effect of multiple discharges and personal harassment is to deprive employees of statutory and common law rights, the employee should be entitled to his day in Court, not as a circumvention of administrative procedure, but as a method of requiring that the Adjustment Board be utilized for its proper purpose of resolving employer/employee contract disputes. Plaintiffs do not believe that the *Andrews* decision was intended to deny them this remedy.

In *Andrews* the Plaintiff instituted an action for wrongful discharge under state law instead of relying on the procedures of the Adjustment Board. This court ruled that the question of wrongful discharge under the contract was within the exclusive jurisdiction of the Adjustment Board.

The present complaint, however, does not merely allege a wrongful discharge or seek recovery for wrongful discharge under a particular contractual situation. To the contrary, Plaintiffs have alleged a course of conduct by railroad officials involving repeated harassment and multiple discharges. It is alleged that this conduct by the employer deprives the employee of substantial constitutional rights. Where in *Andrews* the wrong alleged was within the exclusive jurisdiction of the Adjustment Board, in this case the Plaintiffs seek to en-

join conduct which the Adjustment Board is powerless to prevent. Because the Adjustment Board lacks the power and the expertise to grant the relief requested, any request for the relief sought in this complaint would be futile. In cases such as this where the relief cannot be obtained through grievance procedures, the federal courts have frequently accepted jurisdiction. *Vaca* v. *Sipes,* 386 U.S. 171, 17 L.Ed. 2d 842, 87 S.Ct. 903 (1967); *Glover* v. *St. Louis - San Francisco Railroad Company,* 393 U.S. 324, 21 L.Ed. 2d 519, 89 S.Ct. 548 (1969).

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be allowed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 3, 1974.
April 19, 1974.

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM E. STECKLER, *District Judge*•

NEWTON E. SEWELL and J. B. HOWELL,
Plaintiffs-Appellants,

No. 73-1637 vs.

PENN CENTRAL TRANSPORTATION COMPANY and INDIANA HARBOR BELT RAILROAD COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 539
Bernard M. Decker, Judge.

ORDER

The judgment of the district court entered on May 4, 1973, dismissing the cause is affirmed. *Andrews* v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Dorsey* v. *Chesapeake & Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973).

Affirmed

• District Judge William E. Steckler of the Southern District of Indiana is sitting by designation.

APPENDIX B

RAILWAY LABOR ACT
(45 U.S.C. §151 et seq.)
(Excerpts)

GENERAL PURPOSES

Section 152. The purposes of the Act are: (1) To avoid any interruption to commence or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

GENERAL DUTIES

First: It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference, between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

Section 153. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by

the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train-and-yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This

division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such disputes must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to

make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or

otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may bet set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject

to review as provided in Sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board,

or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member

of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petition, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.